As will be seen from the foregoing cases, the courts have not regarded a cause of action as a fixed and inflexible concept to be applied inexorably in every instance, but as a concept that can be modified so as to reach the most desirable result upon the facts before the court. It is submitted that the concept of a cause of action should not be regarded as fixed and unyielding to be applied strictly under all circumstances, but as flexible and elastic to be modified so as to achieve the most desirable results under the facts of the case in question.

ROLAND A. ZACHMAN

ELECTION OF REMEDIES — REPUDIATION OF ELECTION DOCTRINE IN AMENDMENT OF PLEADINGS — INTERPRETATION OF SECTION 11363, OHIO GENERAL CODE

Plaintiff recovered judgment in an action for breach of a contract to deliver certain stock. The case was reversed by the Court of Appeals and remanded for a new trial. Plaintiff then filed an amended petition alleging substantially the same set of facts as the original petition, but added that defendant had failed to perform its agreement to deliver the stock and that thereafter plaintiff rescinded the contract and demanded that defendant return the money which had been paid. Defendant filed a motion to strike the amended petition from the files on the ground that it set up a different cause of action from that stated in the original petition. Held, that in the light of all the circumstances, there was no prejudicial error in overruling the motion, *Isaac* v. *Intercoast Sales Corp.*, 132 Ohio St. 289 (1937).

Defendant's contention was that the amended petition represented a new cause of action and that there had been an election of remedies by plaintiff when he filed the original petition. The court stated that the principle running through all of the decisions is toward liberality in amending pleadings in the furtherance of justice, especially where the facts are the same and where the amended pleading does not catch the defendant by surprise. It was pointed out that the prayer and essential facts of the original and amended petitions were the same, as was the defense in both trials, namely, that the stock had been delivered by defendant. Defendant knew that plaintiff wanted his money back for the reason that he had never received the stock, and plaintiff knew that the defense of defendant would be that it had delivered the stock. Since each side knew what the position of the other side was, the court thought that defendant was not caught by surprise by the filing of the amended petition.

It has been generally held that a remedy based upon the theory of affirmance of a contract or other transaction is inconsistent with a remedy based on the theory of its disaffirmance or rescission, so that the election of either is an abandonment of the other, *Whiteside* v. *Brawley*, 152 Mass. 133, 24 N.E. 1088 (1890); *Ervine* v. *Goodman & Co. Bank*, 171 Cal. 559, 153 Pac. 945 (1915); *Mintz* v. *Jacob*, 163 Mich. 280, 128 N.W. 211 (1910). Ohio has indicated that such remedies are inconsistent, *Parmlee* v. *Adolph*, 28 Ohio St. 10 (1876); *Frederickson* v. *Nye*, 110 Ohio St. 459, 35 A.L.R. 1163, 144 N.E. 299 (1924). The doctrine adopted by the courts has been that, on the breach of a contract, an election either to sue upon it or to rescind it, if pursued sufficiently, waives the privilege of asserting the respectively inconsistent remedy. *American Woolen Co.* v. *Samuelson*, 226 N.Y. 61, 123 N.E. 154 (1919); *Rasmussen* v. *Hungerford Potato Growers' Ass'n*, 111 Neb. 58, 195 N.W. 469 (1923).

The general principles of the doctrine of election of remedies are not consonant with the theory of the code reform in the furtherance of liberality and simplicity in pleading. The doctrine has been restricted in its application, and in Ohio, *Frederickson* v. *Nye*, *supra*, has established a significant limitation upon it. The court there held that an action at law in deceit averring title in the vendee is inconsistent with an action in equity to establish a constructive trust averring equitable title in the vendor, and that the filing of the law action was an irrevocable election to pursue that remedy. The court said that in order that an election of one remedial right shall be a bar to the pursuit of another, the same must be inconsistent and the election made with knowledge and intention and purpose to elect. The mere bringing of a suit was held not to be determinative of the right, and it was said that the party making the election must have received some benefit under the same, or have caused detriment to the other party, or pursued his remedy to final judgment.

However, as applied to the facts and procedure of the principal case, the limitation of the *Frederickson* case would not be sufficiently broad to shield the plaintiff from the application of the election doctrine, for the principal case does not go beyond the requirements therein set forth. The *Isaac* v. *Intercoast Sales Corp.* case may be more correctly considered as a direct repudiation of the doctrine of election of remedies in the amendment of pleadings where the facts are the same and where the amended pleading does not catch the defendant by surprise. Viewed in this manner, the principal case would appear to be a definite restriction of the application of the election doctrine in this field consonant with the theory of the codes.

In the briefs of both appellant and appellee before the Supreme Court in the instant case, argument was made upon Section 11363, Ohio Gen. Code, which is as follows: "Before or after judgment, in furtherance of justice and on such terms as it deems proper, the court may amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense by conforming the pleading or proceeding to the facts proved." The language which reads: "When the amendment does not substantially change the claim or defense" has been interpreted consistently by the courts as qualifying each instance beforementioned in the statute wherein amendment is permitted. The Ohio courts have thus indicated that despite the enumeration in the statute of the instances wherein amendment may be permitted in the exercise of a wide discretion, yet the statute does not authorize any amendment which substantially changes the plaintiff's claim or defense. Both appellant and appellee recognized such interpretation in their briefs and *Ohio Electric Railway Co.* v. *U. S. Express Co.*, 105 Ohio St. 331, 137 N.E. 1 (1922), was cited, in which the Supreme Court spoke in syllabus to that effect.

It is respectfully submitted that such a limiting interpretation of the clause before-mentioned as a blanket restriction upon the methods of amendment provided for by Section 11363 is unwarranted either from the standpoint of the purpose of the statute in the code reform of Ohio or by a consideration of the logical meaning to be gathered from an examination of the syntax of that section. A perusal of the language "or, when the amendment does not substantially change the claim or defense, *by conforming the pleading or proceeding to the facts proved*" indicates that the restriction therein contained is itself limited to amendment after verdict or at least to amendment during trial. It is stated that amendment should be made after verdict or after proof was made only when such amendment did not change the claim or defense. It was not said that an amendment should be made only when it did not change the claim or defense, and to interpret the language in that manner is highly inconsistent with the theory of the section. One of the principal objectives of the code reform has been the achievement of liberality and elasticity in pleading and the framers of this statute undoubtedly designed it to provide for more or less free amendment as a step towards the attainment of that objective. It is unfortunate that the statute has received an interpretation subversive of the very purpose for

which it was passed, as has so often happened because of the reluctance of the courts to swing away from preconceived formal standards.

The opinion of the instant case makes no mention of Sec. 11363 nor does it expressly indicate a different interpretation from that which has prevailed. However, the liberal and progressive attitude taken by the court in repudiating the doctrine of election of remedies in this field is indicative of a point of view with which the more liberal interpretation of the statute would be entirely consistent. And the result is encouraging, for an amendment is permitted here which has been considered as a substantial change in a claim. Here the judgment was reversed and so the facts cannot be taken as proved. Therefore this case is not within the limitation of the before-mentioned clause in the section, and the decision of the court in permitting the amendment is consistent with a logical construction of the statute and is especially desirable as a step toward the development of a field of free amendment and wide discretion.

The court in the principal case in permitting amendment from the theory of breach to that of rescission treats the factual set-up as one constituting a single cause of action and repudiates the old concept that rescission wipes out the contract completely, revealing a tendency to examine such problems factually rather than legalistically. Where the facts are the same the court seems to think that the slight divergency in the prayer of the amended petition, the mere difference in theory between demanding the return of the money paid and demanding damages for breach of the agreement, should not preclude the amendment of the petition. The court believes that the mere shifting to the theory of rescission should not keep the plaintiff from so amending, especially where it is apparent that defendant is in no way prejudiced since he well knows the plaintiff's grounds for recovery and since his defense would be the same in either case. The solution reached by the court would seem to be a highly desirable one in the interests of liberality in the amendment of pleadings and in the furtherance of justice.

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